No. 1012

Office Supreme Court U. S.
FILED.
MAY 18 1896
J. H. Y.

Supreme Court of the United States

163-700

ALEXANDER McDONALD,

Plaintiff,

against

THE PRESS PUBLISHING COMPANY,

Defendant.

Petition of Defendant for a Writ of Certiorari to the U. S. Circuit Court of Appeals for the Second Circuit.

Please take notice that the within petition will be presented to the Supreme Court of the United States, at the Capitol, in the City of Washington, on the 18th day of May, 1896, on the opening of Court.

Yours, etc.,

BOWERS & SANDS,

Attorneys for Defendant and Petitioner,

54 William Street,

New York, N. Y.

To

DEMING & WALRADT, ESQS.,

Attorneys for Plaintiff,

13 William Street,

New York, N. Y.

The petition of the Press Publishing Company for a writ of *certiorari* directed to the United States Circuit Court of Appeals for the Second Circuit:

To the Honorable the Supreme Court of the United States:

Your petitioner above named respectfully presents its petition for a writ of *certiorari* directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, commanding them to certify and return to this Court all the proceedings by them had in the suit at law lately tried and now pending before them between the aforesaid petitioner, as defendant, and Alexander McDonald, as plaintiff.

Your petitioner avers that the grounds of this application are briefly as follows:

The defendant publishes a newspaper called the New York *World*.

On August 17th, 1892, one Gorsdorfer, who was employed under one of the regular correspondents of the defendant at Cincinnati, sent to the *World* the following dispatch:

"Evan Smith, who was confidential man for his brother-in-law, Alexander McDonald, the millionaire Southern Ohio Manager of the Standard Oil Company until six months ago, when he strangely disappeared, has been located, living in luxury, at Bellmore, a town near Windsor, Canada. McDonald claims that Smith's accounts are straight, but that he is insane, and will be brought to a sanitarium here. D. S. TARBELL." (Fols. 199–201, Record.)

By some means, and as the uncontradicted evidence tends to show, by error on the part of the telegraph company transmitting the message, or by means of a defect or interruption in the action of the wires (fols. 229–30) the name of Smith was dropped from the dispatch, and the

same was delivered to the *World* in its office in New York, and there published in an inconspicuous part of the paper, with the headline added as follows (fol. 68, Record):

"MISSING MILLIONAIRE McDONALD LOCATED.

"CINCINNATI, O., Aug. 17.—McDonald, Southern Ohio Manager of the Standard Oil Company, until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada."

Had the dispatch been published as delivered to the telegraph company in Cincinnati, no cause of action could have arisen to the plaintiff. As published it applied to him and not to his confidential man, Evan Smith.

The plaintiff sued for alleged libel, and recovered $5,000 on the first trial.

This judgment was reversed by the Circuit Court of Appeals for error in permitting counsel for plaintiff to read to the jury the opinion of another Judge, overruling a demurrer to the complaint.

On the second trial the plaintiff recovered $7,000, and this was affirmed by the Circuit Court of Appeals.

The errors which your petitioner alleges were committed, and for which judgment should have been reversed, are as follows:

I.—The trial Judge charged that there was no evidence of actual malice (fol. 323) but left it to the jury to give punitive damages, if they found that the libel was published under such circumstances of reckless and wanton conduct as to amount to malice (fol. 329).

This your petitioner submits was error and your petitioner respectfully alleges that there was no evidence in

this case from which the jury might find reckless and wanton negligence.

The trial Judge and the Circuit Court of Appeals held that the article was susceptible of two meanings—one innocent—one defamatory. Your petitioner further shows that in the opinion of the Circuit Court of Appeals there is the following statement:

"All questions with respect to the alleged libel, which were the subject of this suit, the publication itself, its actionable character, the law in regard to evidence of the plaintiff's social standing, and in regard to the subjects of express malice and punitory damages, were fully considered upon the first writ of error and are stated in the former appeal (63 Fed. Rep. 238)." A copy of which opinion is hereto annexed.

That the opinion in the former appeal reported in 63 Federal Reporter, 238, and hereto annexed; the Circuit Court of Appeals said at page 247: "And it is proved in this case to a demonstration that had the rules of the *World* office provided for a repetition of its dispatches this particular libel on the plaintiff McDonald would not have been published."

Your petitioner respectfully shows that rules of law applicable to the publication of a libel by negligence (not malice) are the same as the rules applicable to any other negligent act.

A person doing a negligent act is responsible in damages, and must compensate the person suffering the loss, but is not liable in punitory damages unless guilty of an evil intention or of acts from which an evil intent can be plainly deduced.

Now, in this case the negligence of the *World* consisted in publishing a dispatch, not libelous on its face, without having the same repeated.

And your petitioner shows that the decision of the Court

that the jury might find from such facts such gross and wanton recklessness as to justify the infliction of a *fine* upon your petitioner was error, and was and is at variance with the decisions of your Honorable Court, and with the decisions of other Courts in this country, to wit:

That it was decided by your honorable Court in the case of Milwaukee, &c., R.R. Co. *vs.* Arms, 91 U. S., 489, that there are no degrees of negligence cognizable in a court of law, and that gross negligence is but want of ordinary care with a vituperative epithet; therefore the proposition established by the Circuit Court of Appeals is that when there is no proof of evil intention, or of any facts from which an evil intention may be inferred, a jury may not only compensate one suffering by the want of ordinary care of another, but may in addition fine the negligent person.

That in support of the proposition as to malice thus far maintained in this action the learned Court of Appeals cited the case of Morning Journal Assn. *vs.* Rutherford, 51 Fed. Rep., 513, a case decided by the same Judge, who wrote the opinion herein. In this case of Morning Journal Assn. *vs.* Rutherford the learned Judge cites as his authority for the proposition that punitive damages may be given for negligent acts the cases of Milwaukee R.R. Co. *vs.* Arms, 91 U. S., 489, and R.R. Co. *vs.* Quigley, 21 How., 201, decisions of your Honorable Court, and your petitioner further states the said cases do not hold any such proposition; that in the said case of Milwaukee R.R. Co. *vs.* Arms, the Court in the opinion said:

"But although, as a general rule, the plaintiff recovers merely such in-
" demnity, yet the doctrine is too well settled now to be shaken, that exem-
" plary damages may in certain cases be assessed. As the question of inten-
" tion is always material in an action of tort, and as the circumstances which
" characterize the transaction are, therefore, proper to be weighed by the
" jury in fixing the compensation of the injured party, it may well be con-
" sidered whether the doctrine of exemplary damages cannot be reconciled
" with the idea that compensation alone is the true measure of redress."

The Court further held that gross negligence, after all, meant only the absence of the care that was necessary under the circumstances, but the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this there must have been some lawful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences; and the Court directed a new trial because exemplary damages had been awarded.

In R.R. Co. *vs.* Quigley, 21 How. 201, your Honorable Court held that an instruction allowing a jury to give exemplary damages in an action for libel was erroneous.

A part of the opinion relating to exemplary damages is as follows:

"In Day *vs.* Woodworth, 13 How. S. C. R. 371, this Court recognized "the power of a jury in certain actions of tort to assess against the tort-"feasor punitive or exemplary damages. Whenever the injury complained of "has been inflicted maliciously or wantonly, and with circumstances of con-"tumely or indignity, the jury are not limited to the ascertainment of a "simple compensation for the wrong committed against the aggrieved per-"son. But the malice spoken of in this rule is not merely the doing of an "unlawful or injurious act. The word implies that the act complained of "was conceived in the spirit of mischief, or of criminal indifference to civil "obligations."

In Day *vs.* Woodworth, 13 Howard, 363, referred to in R.R. Co. *vs.* Quigley, the opinion referring to exemplary damages is as follows:

"It is a well-established principle of the common law, that in actions "of trespass and all actions on the case for torts, a jury may inflict "what are called exemplary, punitive, or vindictive damages upon a "defendant, having in view the enormity of his offense rather than the "measure of compensation to the plaintiff. We are aware that the propriety "of this doctrine has been questioned by some writers; but if repeated "judicial decisions for more than a century are to be received as the best "exposition of what the law is, the question will not admit of argument. "By the common as well as by statute law, men are often punished for

"aggravated misconduct or lawless acts, by means of a civil action, and the "damages inflicted by way of penalty or punishment, given to the party "injured. In many civil actions, such as libel, slander, seduction, &c., the "wrong done to the plaintiff is incapable of being measured by a money "standard; and the damages assessed depend on the circumstances, showing "the degree of moral turpitude or atrocity of the defendant's conduct, and "may properly be termed exemplary or vindictive rather than compensatory.

"In actions of trespass, where the injury has been wanton and malicious, "or gross and outrageous, courts permit juries to add to the measured com- "pensation of the plaintiff which he would have been entitled to recover, "had the injury been inflicted without design or intention, something farther "by way of punishment or example, which has sometimes been called 'smart "money.' This has been always left to the discretion of the jury, as the "degree of punishment to be thus inflicted must depend on the peculiar cir- "cumstances of each case. It must be evident, also, that as it depends upon "the degree of malice, wantonness, oppression or outrage of the defendant's "conduct, the punishment of his delinquency cannot be measured by the "expenses of the plaintiff in prosecuting his suit. It is true that damages, "assessed by way of example, may thus indirectly compensate the plaintiff "for money expended in counsel fees; but the amount of these fees cannot "be taken as the measure of punishment or a necessary element in its inflic- "tion."

It is upon these cases, *in none of which were exemplary damages allowed*, that the Circuit Court of Appeals for the second Circuit founds its theory, that exemplary damages may be given in actions of libel where no actual malice or evil intention is proved or inferred.

And your petitioner respectfully shows that there was no evidence in the case at bar from which the jury could find that the mere omission of a correspondent or a newspaper to have a telegram repeated amounted to such recklessness as to amount to an evil intention.

And your petitioner further states that in no jurisdiction has it been held that the omission of a person sending a telegram without having the same repeated or the act of a person receiving the same in acting upon it without having it repeated, is such "a criminal indifference to civil obligations," "such aggravated misconduct," "such a lawless act," such "a wanton, gross, or malicious injury," such "wilful misconduct," or such "entire want

of care as to raise the presumption of a conscious indifference to consequences" as to justify the infliction of a penalty.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE MEANS NOTHING LESS THAN THAT IN EVERY ACTION FOR NEGLIGENCE EXEMPLARY DAMAGES MAY BE AWARDED.

Numerous cases in other circuits and in various State Courts hold a contrary rule.

Shattuc *vs.* McArthur, Circ. Ct., E. D. Miss., 29 Fed. R. 136, holds that exemplary damages can only be given where defendant is actuated by actual malice, ill will or spite.

Broughton *vs.* McGrew, Cir. Ct., D. Indiana, 39 Fed. 672, holds (pp. 678–679) that exemplary damages cannot be given unless the words were uttered with "actual malice, ill will or hatred toward plaintiff, or with such clear want of ground for doing it as to warrant an inference of ill will or hatred."

"Your petitioner further shows that in Primrose *vs.* Telegraph Co., 154 U. S. 1, your Honorable Court held that a sender of a telegram could recover the amount paid for sending the message where by negligence of the operators the message was changed, the blank contained a provision that messages could be repeated for half rates, and your petitioner respectfully avers that had your Honorable Court believed that it was negligence for a person sending a telegram not to have it repeated, that then the plaintiff Primrose could not have recovered *at all*, because by well-known principles of law a person guilty of negligence contributing to a result cannot recover damages from another whose negligence also contributed to the same result.

See Western Union Telegraph Co. *vs.* Eyser (Colorado)

reported in note at p. 495, 91 U. S., tort action for negligence where the Court, following Milwaukee, etc., R.R., *vs.* Arms, granted a new trial for error of the trial Judge in leaving it to the jury to decide whether exemplary damages should be given.

Western Union Tele. Co. *vs.* Way, 83 Ala. 542;
Western Union Tele. Co. *vs.* Brown, 58 Tex. 170; and
Western Union Tele. Co., *vs.* Godsey (Texas) 16 S. W. Rep. 789;

all hold that exemplary damages cannot be assessed against a telegraph company for failure to deliver a message through negligence.

Templeton *vs.* Graves (Wisconsin), 17 N. W. Rep. 672, and
Eviston *vs.* Cramer (Wisconsin), 15 N. W. Rep. 760,

both hold that in libel and slander punitive damages cannot be assessed unless the defendant was prompted by *express malice*.

II.—Your petitioner further shows that it was error for the Circuit Court of Appeals to refuse to grant a new trial because of admission of evidence tending to show that the dispatch, as sent from Cincinnati, was in itself false (fols. 202, 203 and 204 and 212, 215, 253, 266, 267, 270, 273, 275, 277, 279, 280).

The question on the trial of this action was, "Did or did not the *World* publish a libel of and concerning Alexander McDonald, and in spite of strenuous objec-

tions Alexander McDonald was permitted to prove that the *World* had attempted to publish a libel concerning one Evan Smith. The general rule of evidence applicable here has been laid down by Judge Stephen as follows: "A fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto is deemed not to be relevant." He gives an illustration. "The question is whether A committed a crime. The fact that he formerly committed another crime of the same sort and had a tendency to commit such crimes is irrelevant."

Nor was this evidence admissible upon the question as to whether Gosdorfer, the correspondent, sending the dispatch was careful or not, for the error in the publication did not occur through any mistake on the part of Gosdorfer in collecting the news, but through his failure or failure of the *World* to have the dispatch repeated.

The Circuit Court of Appeals affirmed this ruling, on the ground that the testimony was admissible to refute the theory of the defendant of adequate care in the collection and publication of news.

But such evidence as was introduced in this regard by the defendant only tended to show the care it used in the selection of its correspondents.

Evidence of Chamberlain (fol. 243).

It is respectfully submitted that it was not competent on such question to show that in the sending of this dispatch the employee at Cincinnati erred.

To rebut the evidence of care in the selection of the defendant's agents the plaintiff was bound to show some negligent act of the agent occurring prior to the sending of the dispatch in question, and of which the defendant had or should have had knowledge.

Pittsburgh, &c., Railroad Company *vs.* Ruby,
38 Ind., 10 Am. Rep., 111.

The result of the admission of this irrelevant evidence was most harmful to the defendant, as it compelled the trial of and consideration before the jury of a wrong, if any done, to a person not a party to the suit, and raised an issue the defendant came not to try.

III.—And your petitioner shows that it was a grave error, manifestly harmful to the defendant, for the said Circuit Court of Appeals to refuse a new trial because of the admission of evidence to prove plaintiff's social standing of all the details of his life, such as the number of clubs he was a member of and the companies in which he was director (fol. 66).

The Circuit Court of Appeals in their first opinion said that "it is sufficient to say that when a plaintiff offers to prove his social standing to increase damages, the damages, the testimony admitted, should be confined to his general social standing and not extended to minute details of his life."

At the trial, in spite of defendant's stipulation and admission in open Court (fol. 63) that the plaintiff's "position socially and in a business way is of the highest in the community,—Cincinnati and New York, and that his character is of the best," the following testimony over objection and exception was admitted (fol. 66): "I was president of the Commercial Club of Cincinnati, a business organization composed of fifty of the leading citizens of that city; I was vice-president of the Cincinnati Museum and Art Association; I was a member of the College of Music of Cincinnati, one of the Board of Trustees; I was a trustee and elder in the Second Presbyterian Church of Cincinnati, one of the most influential churches

of our denomination in the State; I was a director in the Cincinnati, St. Louis and Chicago Railroad known as the Big Four; also in the road known as the Cincinnati Southern, a road leading from Cincinnati to New Orleans; and of the Queen City Club, which is the social club of Cincinnati; and several other small institutions." And at fol. 92, over objections, proof of social standing was admitted; this formed an assignment of error, was noticed in our brief below, and yet the Circuit Court of Appeals said in their opinion, "that the amount of evidence of that character was kept within proper bounds," and so in order to sustain this verdict had to reverse their own opinion in the same case!

And your petitioner further shows in the case of Waldron *vs.* Waldron, 156 U. S., at p. 384, your Honorable Court held that evidence adduced to prove a fact, admitted in open Court, is irrelevant.

Of course the mere admission of irrelevant evidence is not harmful error, but where it affects the jury in assessing damages it is harmful error, and the trial Judge herein, although he refused to grant a new trial, nevertheless said (fol. 45, Record): "I cannot find any safe grounds for disturbing the verdict of the jury in this case, although the amount of the verdict is so large as to engender considerable doubt as to whether it ought not to be deemed excessive."

And your petitioner further shows that the question as to whether a plaintiff on an action for libel should be allowed to introduce proof of his social standing, in any event, has never been decided by your Honorable Court.

The decision of the Circuit Court of Appeals herein is at variance with the latest decision of the State Court in the State where this action was tried—Prescott *vs.* Tousey, 50 N. Y. Superior Court, 12 (1884)—and with the decision of the highest Courts in the State of Alabama (Gandy *vs.* Humphries, 35 Ala., 617).

IV.—Your petitioner further shows that it was error for the Circuit Court of Appeals to refuse to grant a new trial, because of the error of the trial Judge in excluding evidence as to the custom of newspaper offices as to the repetition of dispatches, and as to whether errors in dispatches to the "World" had occurred prior to the date of the publication complained of.

These questions were asked of a competent witness (fols. 127 and 145). Evidence of a general custom can never be shown to excuse an act of defendants' negligence. Where the question is, whether an act is or is not negligence, then evidence of the general custom may be introduced.

Brown on Usages and Customs, Section 107.

Such evidence is admitted in admiralty courts where the question is: Did or did not the claimant act negligently in stowing the cargo for damage to which the libellant sued?

The Titania, 19 Fed. R., 101.

Maxwell *ex.* Eason, 1 Stewart (Ala.), 514. Action for damages for negligence. The appellate Court said that question was whether defendant had or had not used ordinary care, or that degree of caution which is due from a man of prudence in the same situation or employment, and held that evidence of the custom generally of persons in the same trade was relevant, and for the error of the trial Court in refusing to admit such evidence directed a new trial.

Kelton *ex.* Taylor, 11 Lea (Tenn., 264).

Story on Bailment, 14 and 15, 1 Green. Ev., 292, 294.

Eddy *vs.* Livingston, 35 Mo., 487.
Houston R.R. Co. *vs.* Cowser, 57 Texas, 293.
Aldrich *vs.* Monroe, 60 N. H., 118.
Jeffrey *vs.* R.R. Co., 56 Iowa, 546.
Hart *vs.* R.R. Co., 84 N. Y., 56.

At folio 110, defendant proved that 120,000 words a night were received in the month of August, 1892, by the *World*, of which about 30,000 to 40,000 were special dispatches, and it was certainly material on the question of negligence in not having messages repeated for the defendant to show that in all these dispatches no such error had ever occurred before.

V.—And your petitioner further shows that it was error for the Circuit Court of Appeals not to grant a new trial for error of the trial Judge in overruling the challenge to the favor submitted by your petitioner to Alonzo Jones, called as a juror.

Your petitioner further shows that the examination of said Jones (fols. 51–61 Record) shows that he had an opinion which it would require evidence to remove, and a prejudice against your petitioner's lawful business, and that his examination was such as to leave nothing to the conscience and discretion of the trial Judge. Certainly in a civil case in a Circuit where a large panel is drawn, a defendant should not be put to its trial before a manifestly prejudiced juror.

VI.—Your petitioner further shows that it was error for the Circuit Court of Appeals to refuse to grant a new trial because of error of the trial Judge in submitting the article complained of to the jury to determine what was its meaning.

The words of the article were not ambiguous, and the meaning should have been determined by the Court. This point was raised upon motion to direct judgment after all the evidence in the case was in.

Moore *vs.* Francis, 121 N. Y., 199.
Woodruff *vs.* Bradstreet Co., 116 N. Y., 217.

The article in question was not of necessity libellous *per se*. The Court left to the jury to determine whether or not it was libellous. This was done upon the innuendo of the complaint reading as follows:

"Thereby meaning and intending to accuse the plaintiff of the crime of embezzlement, or of being accessory thereto, and meaning and intending to be understood and believed that the plaintiff had been guilty of the crime of embezzlement, or that plaintiff was accessory to such crime, and guilty as such, and meaning and intending to accuse the plaintiff of, and to have it understood and believed that he was guilty of a great and infamous crime, and meaning and intending to accuse the plaintiff of odious and disgraceful conduct, and thereby to injure and destroy his character and bring him into disrepute and disgrace, and meaning and intending that plaintiff was therefore obliged to secretly run away to Canada, and that he was there found living in luxury on his ill-gotten gains" (fol. 16, Record).

To justify such innuendo it is respectfully submitted that there must have been contained within the pleading a distinct averment of facts which should have been proved upon the trial from which the jury could infer that the article was capable of the construction claimed for it in the innuendo, that is to say, it should have been averred in the complaint that Canada, at the time of the publication complained of, was a place of refuge for criminals and

embezzlers; that the extradition laws did not provide for the return to this country of embezzlers; that thus the words acquired a libellous meaning; that the defendant used the words with such libellous meaning; and that the same would be so understood by others. It was precisely upon such contention that the case was presented to the jury.

Judge Wallace in his opinion upon the demurrer, originally interposed in this action (see 55 Fed. Rep. 264–265), says upon this point:

"On the other hand, it is a matter of common knowledge that those of our countrymen who expatriate themselves under such circumstances in Canada are frequently fugitives from justice. So often is this the case that it is not too much to say that the first impression upon reading a paragraph like this would be that the person referred to in it had been guilty of some breach of trust, and joined the colony of American embezzlers and defaulters *who have found a haven of refuge, safe under the extradition laws*, among our Canadian neighbors."

It was upon this theory throughout that the case was tried; upon this theory the jury were asked to give a verdict, and upon this theory their verdict was given.

All this was done without the averment of a single fact in the complaint on which to base the innuendo. Indeed, no fact could be averred on which to base the innuendo for the very good reason that the treaty of the United States with Great Britain in existence at the time of the publication of the alleged libel forbade any such interpretation.

It is respectfully submitted that the Court should have ruled as matter of law that the article in question was not libellous, and that there were no sufficient allegations in the complaint and no sufficient proof on the trial to justify the submission to the jury of the question whether or not the article was libellous.

Indeed, under the treaty above mentioned, directly the contrary should have been held, and it was the refusal to so charge at the defendant's request that constitutes the seventh error.

VII.—And your petitioner further shows that it was error for the Circuit Court of Appeals not to grant a new trial, because of the error of the trial Judge in refusing to charge as requested by the defendant concerning the term of the treaty existing between the Governments of the United States and Great Britain (fols. 346 to 348, Record).

The plaintiff went to the jury upon the claim that the article implied that Canada was a haven of refuge for criminals, and in determining whether the article was libelous or not this question became important.

The Constitution of the United States, Article VI., Section 1, Subdivision 2, declares that treaties are the supreme law of the land.

In People *ex rel.* Young *vs.* Stout, 81 Hun, N. Y. 336, and

Le Croix Fils *vs.* Sarrasin, 15 Fed. Rep. 489, it was held that a Judge must take judicial notice of public treaties and proclamations of the United States.

VIII.—That by reason of the matters aforesaid the said opinion is erroneous and ought to be set aside by your Honorable Court.

IX.—That all the errors above set forth were properly assigned as errors in the Circuit Court of Appeals, and were noticed on the brief of your petitioner's counsel there.

X.—That the said cause is still pending in the said Court.

XI.—That your petitioner herewith furnishes your Honorable Court with a certified copy of the whole record of said cause, and that annexed hereto are copies of the opinions of the Circuit Court of Appeals on the first and second writs of error.

Wherefore your petitioner prays that your Honorable Court may be pleased by writ of *certiorari* or otherwise to require the said cause to be certified to this Court for its review and determination, with the same power and authority as if it had reached this Court by appeal or writ of error.

And your petitioner will ever pray, etc., etc.

[SEAL.] THE PRESS PUBLISHING COMPANY,
By JOHN NORRIS, Treasurer.

STATE OF NEW YORK,
City and County of New York, } ss.:
Southern District of New York,

JOHN NORRIS, being duly sworn, deposes and says: That he is an officer of the above petitioner, the Press Publishing Company, to wit, the treasurer. That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

JOHN NORRIS.

Sworn to before me this
14th day of May, 1896.

GEO. C. FIEGEL,
[L. S.] Notary Public,
New York County.

I certify that I have examined the foregoing petition, and that, in my opinion, the same is well founded, and one of which the prayer should be granted.

JOHN M. BOWERS,
Of Counsel.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND DISTRICT.

THE PRESS PUBLISHING COMPANY

vs.

ALEXANDER McDONALD.

Opinion on Second Writ of Error. Filed April 7th, 1896.

This writ of error was brought by the defendant in the Circuit Court to review the alleged errors of the Circuit Judge upon the second trial to the jury of an action pending in the U. S. Circuit Court for the Southern District of New York, for an alleged libel which was published in the New York *World*.

SHIPMAN, *C. J.*:

The facts with respect to the alleged libel which is the subject of this suit, the publication itself, its actionable character, the law in regard to evidence of the plaintiff's social standing, and in regard to the subjects of express malice and punitory damages, were fully considered upon the first writ of error and are stated in the opinion of this Court (63 Fed. Rep., 238).

The questions which arise upon the present writ of error, which are both new and important, are the alleged errors in overruling a challenge to the favor and in admitting the challenged person to become a juror, and in the admission of evidence in regard to the falsity of Gosdorfer's original dispatch.

Alonzo B. Jones, an architect, and apparently an intelligent and cautious person, who was called as a juror, was examined by the counsel for the defendant and by the Judge. In reply to the defendant's counsel he said, among other things, that he had no feeling or prejudice against the *World* and no prejudice against the newspapers of the City of New York; that he thought the papers of the city published articles which they ought not to publish; that no publication in the *World* against any of his friends had been made; that the first impression would be against newspapers on a charge of libel, and that it was a feeling that would require some little effort for him to free himself from. To the Judge he said that he had no doubt at all in regard to his ability to render an impartial verdict in any case against a newspaper, or of his ability to be impartial in a case against the *World;* that he would give the defendant corporation the benefit of the rules of law and of the evidence which was in its favor. The defendant's counsel then asked the following question:

"If the case involved the precise point suggested by his Honor as to whether or not the defendant had exercised fair care in the publication of an article affecting a private individual, would or would not the feeling that you hold affect your deliberation as a juror?" to which the witness replied, "I think it would." To the question of the Judge, "Do you mean to say that you would assume that the newspaper had not exercised due care, irrespective of the character of the article, or the circumstances of the case," he replied, "No; I do not."

Challenges in the Federal Courts to the favor are tried by the Court (Rev. Stats., Sect. 819), and an alleged error in the decision which is duly excepted to is the subject of review by the Appellate Court. But it must be remembered that the question before the trial Judge, although

one of mixed law and fact, is, in the main, a question of fact, and that while he may be sometimes wrongly influenced by a desire to expedite the trial, or by impatience of delays, yet if his mind is undisturbed, the impression which the juror makes of his intelligence, fairness and evenness of mind, from a personal inspection of him, and the belief in regard to his probable character, which is created by his appearance under examination, his bearing and willingness to disclose the nature and extent of his preconceived opinions, are valuable and have deserved weight before an appellate Court, and therefore the finding of fact by the trial Court will not be set aside except for manifest error. Thus Chief Justice Waite in Reynolds *vs.* U. S. (98 U. S., 145), says in regard to the finding upon a challenge for cause in a criminal case, the alleged cause being a preconceived opinion, as follows: "It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the Court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial Court upon that issue ought not be set aside by a reviewing court unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the Court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the Court."

The tendency of the modern decisions by the New York Court of Appeals is also to regard the question arising under a challenge to the favor as one of fact in the majority of cases, and dependent upon the circumstances of the particular case, and, therefore, to give proper weight to the opinion of the trial Judge who had an opportunity to see the juror. (Thomas *vs.* People, 67 N. Y., 218; Young *vs.* Johnson, 123 N. Y., 226.)

In this case, if the answer of Jones to the last question which was put by the defendant's counsel, was the only or was the main answer in the examination, the challenge should have been sustained. He had said abundantly that he had no feeling or prejudice against the *World*, but that his first impression would be against newspapers who were charged with libel. In reply to the Court, and to a certain extent also from his previous answers, it became apparent that this impression was a general one, that newspapers were not as careful as they should be in regard to their publications concerning the private transactions of individuals, but he had no doubt that he could render an impartial verdict in a case against the *World* or any other newspaper, and would give to the defendant the benefit of the evidence in its favor. At this point the Court overruled the challenge. The counsel then put the question and answer which has already been quoted, and in reply to the Court's question the witness said that there would be no assumption on his part that the newspaper had not exercised due care. The Court again overruled the challenge, evidently upon the ground that the entire examination showed that while there was an impression that newspapers, as a class, were not as careful as they ought to be in publications of a personal character, yet that the man not only intended to be impartial, but was actually so, and that his impression or "feeling" was not of that substantial character which would interfere with and put his

judgment or faculty for judging truly, out of equipoise. When the juror was asked about this vague impression or feeling, his answers gave it undue importance. When he investigated his own impartiality, he had no doubt of himself, and in that conclusion the trial Judge, who saw and endeavored to scrutinize and weigh the juror, coincided. We concur in his conclusion that the impressions were of the character "which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of it," and which Chief Justice Marshall thought constituted no sufficient objection to a juror (1 Burr's Trial, 416).

The defendant urges Jones' prejudice against newspapers, as an objection to his competency, upon the ground that a juror who has a prejudice against lawful business is incompetent. Assuming that the proposition is true, Jones' impression in regard to the methods of conducting newspapers, was not of that character which could be considered a disqualifying prejudice.

The next exception relates to the admission of testimony in regard to the falsity of Gosdorfer's original despatch. The case really turned upon the question of damages, the effort of the defendant being to reduce them to a nominal sum, and to that end to show that there was no wantonness or carelessness, but that it exercised a high degree of care in the selection of correspondents and in the reliance upon them for truthful despatches. It offered Gosdorfer as a witness, who proved that he wrote and sent the original despatch, and also offered the despatch itself. Upon the cross-examination of Gosdorfer, the plaintiff endeavored to show that he had, without investigation, incorrectly changed the language of the statement which he originally saw in regard to Evan Smith, and offered further evidence to show the untruthfulness of the despatch as sent, and that investigation would have shown its incorrectness.

This testimony was admissible for the purpose for which it was offered, to attempt to refute the theory of the defendant of adequate care in the collection and publication of news, by an examination of the truthfulness of the despatch which the defendant had put in evidence as the origin of the published despatch.

The general subject of testimony in regard to the social status of a libelled plaintiff, was so fully examined in the former opinion that the discussion needs no repetition. The amount of testimony of that character, upon this trial, was kept within proper bounds by the trial Judge. After the plaintiff had stated the character and extent of the social and business positions which he occupied, a single witness replied most briefly to a very general inquiry in regard to the plaintiff's business and social standing.

The judgment of the Circuit Court is affirmed, with costs.

JOHN M. BOWERS, for the plaintiff in error.

HORACE E. DEMING, for the defendant in error.

[Endorsed]: United States Circuit Court of Appeals for the Second Circuit. The Press Publishing Company *vs.* Alexander McDonald. Opinion, Shipman, C. J. United States Circuit Court of Appeals, Second Circuit, filed April 7, 1896. James C. Reed, Clerk.

U. S. CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

THE PRESS PUBLISHING COMPANY,
Plaintiff in Error,

vs.

ALEXANDER McDONALD,
Defendant in Error.

Before
LACOMBE,
Circuit Judge.

WHEELER and
TOWNSEND,
District Judges.

Opinion on First Writ of Error filed Sept. 12th, 1894.

Writ of Error to review a judgment of the U. S. Circuit Court, Southern District of New York, entered upon the verdict of a jury giving the defendant in error the sum of $5,000 as damages for the publication of a libel upon him in the New York *World*, a newspaper published by plaintiff in error. A demurrer to the complaint was interposed by defendant, and overruled by Judge Wallace (55 Fed. Rep., 264). Thereafter the cause came on for trial before Judge Shipman and a jury with the result above indicated.

LACOMBE, Circuit Judge:

The libel complained of was published under the following circumstances. One Tarbell was a regular correspondent of the *World* newspaper in Cincinnati, Ohio. The rules of the paper required him when leaving his locality for a day or more to have some one authorized to receive despatches for him and do his work. It was left to him to

select the subordinate or substitute thus employed. Tarbell's newspaper work having become too heavy for him to handle by himself, he engaged a young man of twenty named Gosdorfer to look after the New York *World* correspondence, instructing him to send all "good news" to that paper. On August 17th, 1892, the Cincinnati *Evening Post*, a reputable paper published in that city, contained an article touching one Evan Smith. Believing that the substance of such article would be acceptable to the *World*, Gosdorfer condensed it into the following despatch, which on the same day he sent over Tarbell's name by the Postal Telegraph Company. As delivered to the Telegraph Company at its Cincinnati office, it read:

> "The World, New York. Two o'ck. * * * Evan Smith, who was confidential man for his brother-in-law, Alexander McDonald, the millionaire Southern Ohio Manager of the Standard Oil Co., until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, a town near Windsor, Canada. McDonald claims that Smith's accounts are straight, but that he is insane and will be brought to a sanitarium here. D. S. TARBELL."

To facilitate the receipt of its despatches, the plaintiff in error had an arrangement with the telegraph company whereby loops were put in between the latter's main office and the *World* office, and instead of despatches from other cities to the telegraph office being transmitted by messenger, they were switched on to these loop wires, and came direct into the *World* office, where the telegraph company had employees who took down the messages, which were then delivered to boys who carried them to the telegraph desk, whence they were distributed to the telegraph editors. The function of the telegraph editor is to read over carefully any despatch received by him, to correct the English, to eliminate anything which he thinks does any injustice to anybody or anything, or which causes a doubt in the mind of the reader as to the accuracy of

the despatch, and to put headlines on. Thereupon the despatch is sent to the composing room and in due course is printed in the paper. The "publisher" of the *World* testified that the authorized custom in its office is that unless a despatch from a distant city "*per se* raises in the mind of the telegraph editor a suspicion of its accuracy, then he cannot change the facts: and it is optional with him then to judge of the importance of the despatch and withhold it from the composing room or have it set up." Where there is nothing on *the face of the despatch* which raises a natural doubt as to its accuracy, it goes to the composing room with its statement of facts substantially unchanged.

The despatch as published in the *World* of August 18th, 1892, was substantially different from the one sent by Gosdorfer. It reads as follows:

"CINCINNATI, O., August 17.—McDonald, Southern Ohio Manager of the Standard Oil Company until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada."

To this there was prefixed the head-line

"MISSING MILLIONAIRE McDONALD LOCATED."

When the case came on for trial the despatch, as written out by the telegraph employee in the *World* office, could not be found, nor was the plaintiff in error able to show which one of its ten telegraph editors had received it. There was some evidence tending to show that as thus written out, it was phrased as subsequently published, not as sent from Cincinnati. And it was the theory of the defense that, there being nothing on its face to raise a suspicion of its accuracy, it was sent to the composing room in accordance with the authorized custom of the paper. That custom required no effort to be made to verify the accuracy of such despatches, and no such effort was made in this instance.

It was contended by the plaintiff, and evidence in support of that contention was introduced, that the statements touching Evan Smith in Gosdorfer's original despatch were themselves untrue, a matter which need not be discussed here, since the falsity of the assertions touching McDonald in the despatch as published is not disputed.

The plaintiff in error contends:

FIRST.—That the Court erred in denying the motion to direct a verdict for the defendant, and in leaving it to the jury to find whether the publication was a libel.

It is insisted that the words of the alleged libel were not ambiguous, and that the Court, as matter of law, should have determined that the article was not actionable. Undoubtedly, when the words used are unambiguous and admit of but one sense, the question whether or not they are libelous is one of law which the Court must decide Equally true is it that when the words used are "ambiguous in their import, or may permit, in their construction, connection or application, a doubtful or more than one interpretation, and in some sense be defamatory, the question whether they are such is for the jury." Woodruff *es.* Bradstreet Company, 116 N. Y., 217. And the question here presented is the single one—was the publication so phrased that, taken as a whole, it would fairly permit an interpretation in some sense defamatory, although its separate statements taken by themselves contained no improper suggestions? To this, in our opinion, there can be but one answer. It was not necessary for the plaintiff to aver and prove, as a matter of fact, that there are many American embezzlers in Canada. Nor was it necessary to aver or prove extrinsic facts in order to show that the words were susceptible of a defamatory construction, as it was in Caldwell *es.* Raymond, 2 Abb.

Pr., 193, where the publication was of a simple marriage notice, which could be shown to be defamatory only by proving that the woman named therein was a prostitute. Nor is this a case, as counsel for appellant contends, where the doctrine of judicial notice has been extented beyond its well-recognized boundaries. The meaning of words of common speech, of terms which from continuous use have acquired a definite signification, generally, if not universally known, has always been judicially recognized by the Courts. The meaning or signification thus generally accepted may be one which the word or phrase ought not to be saddled with; but if such word has acquired that meaning in the community, it is the duty of a court to recognize it. Mr. Beecher may not have been a clerical adulterer, but when the Kalamazoo Publishing Company printed of a clergyman: "Then there was that Iowa Beecher business of his, which beat him out of a station at Grass Lake," it was left to the jury to say whether or not it involved a charge of adultery, for "courts have no right to be ignorant of the meaning of current phrases, which everybody else understands." Bailey *vs.* Publishing Company, 40 Mich., 256. So here, although it be the fact (as counsel contends) that no more than ten defaulters ever fled to Canada, and although it is no longer a safe refuge for them, yet the statement that a man of great wealth had strangely disappeared, had secreted himself for six months, and was finally found living in luxury at some small Canadian town was calculated to suggest to the community in which the libel in this case was published the impression that he had been guilty of some offense against the civil or criminal laws, or of immoral or discreditable conduct.

Tested by the rule for which plaintiff in error contends, viz., that words are to be understood in their plain and natural import, according to the *ideas they are calculated*

to convey to those to whom they are addressed—the publication was plainly susceptible of a defamatory interpretation. The jury had no difficulty in reaching that conclusion, nor do we see any error in the statement contained in the opinion on the demurrer, that such would be the first impression upon reading a paragraph like this. That the publication is calculated to produce precisely that impression was, quite curiously, made manifest by defendant's own proof. The original despatch prepared by the *World's* correspondent in Cincinnati, contains precisely the same statements of strange disappearance, six months' seclusion, discovery living in luxury in Canada,—all made as to Evan Smith, confidential man for McDonald, and then adds "McDonald claims that Smith's accounts are straight." Manifestly the writer of this despatch understood perfectly well that the first part of it would convey the impression that "Smith's accounts were *not* straight."

Inasmuch therefore as the publication did permit of an interpretation in some sense defamatory as well as of one entirely harmless, as it admitted of such interpretation without proof of any extrinsic facts, but solely because the language in which it was phrased was calculated to convey such an impression to the community, where the libel was published and the Court sat, and as the plaintiff by innuendo pointed out the former as being the meaning which defendants intended to convey to its readers, it was properly left to the jury to decide whether or not such publication was libellous.

SECOND.—Plaintiff in error insists that the Court erred in admitting proof of the plaintiff's social standing, the evidence being as it contends introduced "for the purpose of bolstering up the case before the jury (in order that) if the jury should be informed that defendant in error was a man of very high position in the world they

could only pay him for his wounded feelings by a verdict out of all proportion to that which would be given to an ordinary citizen." The authorities bearing upon this point are conflicting. The text-writers are not in accord. In Massachusetts it was held as far back as 1807 that the plaintiff in actions for defamation of character may give in evidence to aggravate the damages his own rank and condition of life, because the degree of injury the plaintiff may sustain by the defamation may very much depend on his rank and condition in society. Larned *vs.* Buffinton, 3 Mass. 546. In Harding *vs.* Brooks, 5 Pick. 247, Chief Justice Parker, says: "The rank and condition of the plaintiff are proper to be made known to a jury by evidence, because the damages may be lawfully affected thereby; but general character has not been the subject of inquiry, unless made necessary by the defense to the action, or to the claim of damages." In Pennsylvania it was held by Judge Sharswood, in Klump *vs.* Dunn, 66 Pa. St., 147, that "the position in life and the family of the plaintiff are always important circumstances bearing upon the question of damages, and have always been held admissible for that purpose." See also McAlmont *vs.* McClelland, 14 Serge. & R. 359, where it is said that juries in libel suits always take into view the condition in life of the parties. The point is discussed at considerable length and the Court expressly lays down the proposition that the plaintiff in such actions may give evidence of his own condition in life to aggravate the damages. A similar rule is applied in Connecticut (Bennett *vs.* Hyde, 6 Conn. 24); in Illinois (Peltier *vs.* Miet, 50 Ill. 511); in Virginia (Adams *vs.* Lawson, 17 Gratton, 250), and in Kentucky (Eastland *vs.* Caldwell, 4 American Decisions, 668). See also Shroyer *vs.* Miller, 3 W. Va. 161; Fowler *vs.* Chichester, 26 Ohio St., 9. A decision in Indiana where the question raised was as to the admissibility of a question

calling for the defendant's position in society seems to indicate that a similar rule would control there touching such testimony when offered on behalf of the plaintiff. A contrary rule prevails in Alabama. Gandy *vs.* Humphreys, 35 Ala. 617.

The point does not seem to have been presented either to the Supreme Court of the United States or to any of the Circuit Courts of Appeal. In Romaine *vs.* Duane, 3 Wash. U. S. 246, the Court decided in a libel suit that character being put in issue the plaintiff might give evidence of his character before the defendants had attacked him. In Wright *vs.* Shroeder, 2 Curtis' C. C. 548, Judge Curtis held that while the defendant may offer evidence of the plaintiff's bad reputation to reduce the damages, the plaintiff may not introduce evidence of his previous good character in chief before any attack upon his character, although the learned Judge admits that there are authorities to the contrary. The two cases last cited, it will be observed, deal not with standing in society, but rather with general good character and reputation morally. The plaintiff in error cites the case of Prescott *vs.* Tousey, decided in 1884, by the General Term of the New York Superior Court, Judge Sedgwick dissenting (50 N. Y. Superior 12). The prevailing opinion in that case does, undoubtedly, hold that it was error to receive evidence of the plaintiff's social position and standing in society. The learned Judge who wrote the opinion, however, seems to have reached his conclusion through a misconception of some of the earlier decisions in this State. He cites Hatfield *vs.* Lasher, 81 N. Y. 246, as authority for the proposition that evidence of the plaintiff's bad reputation is not admissible for the purpose of showing that his reputation was so bad that defendant's libel could not injure him, and proceeds with perfectly sound logic—"if

defendant cannot prove plaintiff's bad reputation to decrease damages, why should plaintiff be allowed to show his good reputation for the purpose of increasing them? And if plaintiff cannot show his good reputation, why should he be allowed to show his standing in society, especially since the laws of this State do not recognize different ranks in society?" Turning to Hatfield *vs.* Lasher, 81 N. Y. 246, we find that the precise point was not involved, although a dictum of Chief-Justice Folger, who writes the opinion, apparently goes to the full extent of the doctrine enunciated in the Superior Court. The Chief-Justice says of the proposition that "a person of disparaged fame is not entitled to the same measure of damages as one whose character is unblemished [a fact which] it is competent to show by proof"—"such is not the rule in this State." In support of this proposition he cites Root *vs.* King, 7 Cowen, 529, and Gilman *vs.* Lowell, 8 Wendell, 579. Neither of these cases at all supports the proposition for which it is cited. In the earlier of them, Chief-Justice Savage writing the opinion, cites Larned *vs.* Buffinton, 3 Mass. 546, refers to the English rule that the defendant may give evidence of plaintiff's general bad character in mitigation of damages; states that the same rule prevails here upon the ground that a person of disparaged fame is not entitled to the same measure of damages as another whose character is unblemished; and adds that under any circumstances defendant may show that the plaintiff's reputation has sustained no injury because he had no reputation to lose. In the other case cited by Chief-Justice Folger, namely, Gilman *vs.* Lowell, 8 Wend. 573, the Court says, "whether the plaintiff's rank and condition in life may be shown either to enhance or diminish the damages, it is unnecessary now to decide; and it is not perceived that this principle has any connection with malice [which was the pre-

cise point before the Court]: it is proper under the head of inquiry into general character. Persons in different stations would be differently damnified by the same slanders."

In Foote *vs.* Tracy, 1 Johnson, 52, Kent, Chief Justice, says: "In assessing damages the jury must take into consideration the general character, the standing and estimation of plaintiff in society; for it will not be pretended that every plaintiff is entitled to an equal sum for the worth of character. The jury have and must inevitably have a very large and liberal discretion in apportioning damages to the rank, condition and character of the plaintiff; and they must have evidence touching that condition and character so as to have some guide to their discretion." In Palmer *vs.* Haskins, 28 Barbour, 95, Marvin, J., says, "That the general standing in society of either of the parties may be proved I have no doubt." Other cases in the same State which may be referred to are Fry *vs.* Bennett, 4 Duer, 262; Hamer *vs.* McFarlin, 4 Deyo, 509; Inman *vs.* Foster, 8 Wendell, 602.

We are of opinion that the weight of authority is clearly in support of the proposition that the condition in life of the plaintiff may properly be given in evidence in chief to aggravate damages. Of course if some peculiar and special damage is claimed it should be specially pleaded. While it is true that plaintiff's character and reputation morally are presumed to be good and therefore need not be proved by him to be such unless attacked, there seems no sound reason for holding that he may not prove his station in society as part of his testimony in chief, in view of the statement in Gilman *vs.* Lowell, which (despite the decision in Prescott *vs.* Tousey) is still the law of this State, that "persons in different stations would be differently damnified by the same slander."

In some respects, the evidence on this branch of the

case at bar, went more into detail than in any of the cases above cited. Whether this was error, and if so, whether it was harmful error we need not discuss at length in view of the disposition to be made of the case. It is sufficient to say that when a plaintiff offers to prove his social standing to increase damages, the testimony admitted should be confined to his genaral social standing, and not extended to minute details of his life.

THIRD.—The plaintiff in error further contends that the instructions of the Court as to the question of express malice were erroneous, and that the charge to the jury should have been corrected in accordance with his requests.

Upon this branch of the case the Court, after defining punitory damages, charged the jury that:

"In this case it is not shown that the defendant had any knowledge of, or animosity against the plaintiff. It did not publish the libel for the purpose of injuring him and therefore there is no claim that express malice can be shown by any direct intention to injure the plaintiff. But it is claimed, and it is true, that express malice may also be shown by a reckless and wanton carelessness * * a wanton neglect to ascertain the truth [of the publication] when means of accurate knowledge are readily attainable. A reckless lack of knowledge or care to know whether a grave imputation of crime or criminal conduct is true or false, and the absence of precautions taken to obtain knowledge of the truth of a charge of criminality against a person in regard to whom accuracy was obviously easily attainable, may be adduced to show what the law terms express malice."

The Court next reviewed the theories of plaintiff and defendant upon the question whether the facts in proof did or did not show such reckless carelessness or wanton neglect, and further charged:

"The question whether any punitory damages are to be given depends upon your conclusion whether the publication was made with recklessness and with a wanton disregard of the question of its truth or falsity. Upon this question the plaintiff takes the burden of proof. If you find in the affirmative you are not compelled, but are permitted to give such reasonable and just damages as you think it wise to give to deter like conduct in the

future; the amount of vindictive damages is within your discretion, but it is my duty to caution you against excessiveness. You are to be reasonable and just. * * * * If you think that sufficient caution was exercised, or if the alleged mistake was a sufficient excuse for the publication, you will not find vindictive damages or any damages in excess of just compensation to the plaintiff. * * * * The real and important question as it occurs to my mind is whether the despatch as published, and upon the theory that it was a mistake, and admitting that it was a mistake was published with such recklessness and indifference to the truth as justly to charge the defendant with express malice.

"The defendant is a corporation and cannot be visited with exemplary damages, although its employees were guilty of express malice in the publication, unless the corporation has authorized the system or conduct, which is the only system relied upon as indicative of express malice in the case, or has subsequently ratified the publication."

This is an accurate presentation of the law as to punitory damages in libel suits. Association *vs.* Rutherford, 2 C. C. A. 354. They may be awarded not only when the libel has been "conceived in the spirit of mischief," but when it has been published with "criminal indifference to civil obligations." For injuries inflicted "wantonly" as well as for those inflicted "maliciously," exemplary damages may be awarded. R. R. Co. *vs.* Quigley, 21 How., 202.

The counsel for plaintiff in error took no exception to the charge as above set forth, but only to the Court's refusal to charge two requests of his own, as follows:

"FIFTH.—There is no evidence in this case that the defendant was influenced by actual or express malice towards the plaintiff in making the publication complained of."

"SIXTH.—Express malice is when one with a deliberate mind and formed design commits the act complained of."

In refusing to charge this last proposition the Court stated that it "would not limit express malice to that precise language."

This was not error. The Court had already charged that there was not in this case any direct intention to injure the plaintiff, and the request as phrased took no account of that form of malice, well recognized in cases such as these, where without "deliberate mind" or "formed design" the offender has been so grossly and recklessly negligent, so wantonly indifferent to another's rights, that he should be required to pay damages in excess of mere compensation as a punishment and example.

The refusal to charge the fifth request challenges the right to give exemplary damages upon all the facts of the case. The plaintiff in error cites R.R. Co *vs.* Prentice, 147 U. S. 101; Haines *vs.* Schultz, 50 N. J. Law, 481, and Daily Post Co. *vs.* McArthur, 16 Mich. 447. The first of these is not authority for the proposition that exemplary damages can in no case be recovered against a corporation for the reckless, wilful and malicious act of its agent, the opinion of the Supreme Court expressly pointing out that in the case before it there was no proof that "the conductor was known to the defendant to be an unsuitable person in any respect." If the injury done to the plaintiff is the result of a rule, custom or system, which is prescribed or maintained by the corporation itself as a part of its regular course of business, and which, with inexcusable recklessness and in wanton disregard of others' rights, itself promotes the circulation of libels, the corporation may be held responsible, although it was at the time not otherwise a participant in the personal express malice or criminal carelessness of its employee. In Haines *vs.* Schultz, 50 N. J. Law, 484, the error of the trial Judge was held to be "relieving the plaintiff of the burden of proof and transferring it to the defendant," the charge of the trial Judge practically leaving it to the jury to assess exemplary damages unless the defendant adduced proof of his disapproval of the

libellous article. And the New Jersey Supreme Court add "had there been any proof of such approval, any testimony of general instructions, of which this libel was the outgrowth * * * the jury might have been warranted in inferring a wrongful motive to fit the wrongful act." The discussion of the subject in Daily Post Co. *vs.* McArthur, 16 Mich. 447, is an exhaustive and able one. The Michigan Court holds as did this Court in Association *vs.* Rutherford, *supra*, that the reading public are not entitled to discussions in print upon the character or doings of private persons, except as developed in legal tribunals, or voluntarily subjected to public scrutiny. It reversed the Court below because the charge of the Court left it in the power of the jury to hold the defendant corporation "in all respects identified with the faults of its agents"; but it also expressly recognized the principle that when there is proof tending to show, on the part of the defendant itself, a want of solicitude for the proper conduct of its paper, a recklessness of consequences which dispensed with such precautions as would reasonably prevent an abuse of the columns of the paper, exemplary damages may properly be given.

In the case at bar, in addition to the evidence already referred to touching the authorized system or custom of the paper in publishing statements as to the doings of private persons, it appears that it was perfectly well known to the defendant, from actual experience, that in the despatches received over the loop connections from distant cities "errors occur quite frequently," not only from the carelessness of some telegraph operator, but also from grounding or crossing of wires or other natural causes. Telegrams may be repeated, as the defendant's witness expresses it, "to ensure safety." This would cost more, and the despatches received by the *World* during a single

afternoon and evening are so voluminous that if all were repeated there would not be time to have them all thus "ensured" and still ready to go to press in time for publication on the ensuing morning. It appears further that no despatches such as the one complained of are repeated, and that the system and rules of the office do not allow that to be done nor provide any means for the detection or prevention of such errors, except perhaps in those cases where the despatch is contradictory on its face. The plaintiff thus showed by affirmative proof that—presumably either to save money or to save time—the defendant itself devised and maintained a system of general instructions under which any despatch from its out-of-town correspondents, although containing aspersions on the character of private persons, would be published without any effort whatever to ascertain its accuracy even by the exercise of the ordinary and reasonable degree of care which persons not in the newspaper business are accustomed to employ with despatches which they esteem important. See in this connection Primrose *vs.* Telegraph Co., 14 Sup. Ct. 1098. And it is proved in this case to a demonstration that had the rules of the *World* office provided for a repetition of its despatches this particular libel on the plaintiff McDonald would not have been published, the statements of its correspondent referring not to McDonald, but to Smith.

It certainly seems to us that the jury were entitled upon the evidence to find in the defendant itself the reckless carelessness and wanton disregard of the rights of others which is required to sustain a verdict for punitory damages. There was no error, therefore, in the Court's refusal to charge defendant's two requests.

Fourth.—It has seemed desirable to express an opinion upon the points already discussed, although we have

reached the conclusion that the judgment must be reversed for error in allowing counsel for defendant in error to read to the jury *in extenso* the opinion of Judge Wallace overruling the demurrer to the complaint.

The rule and the reason for it are alike well expressed in Baker *vs.* City of Madison, 62 Wis. 137: "The jury must find the facts in any given case from the evidence given to them on the trial, and that alone, and must take the law of the case from the Judge who presides at the trial." See also Crawford *vs.* Morris, 5 Grat. 103; Bell *vs.* McMaster, 29 Hun, 272; Good *vs.* Mylin, 13 Penn. St. 538; Warren *vs.* Wallis, 42 Tex. 472; Butler *vs.* Glenn, 50 Penn. St. 459, and the opinion of the U.S. Court of Appeals for the First Circuit, Arey *vs.* De Loreia, 5 C. C. A. 116. Even if it were within the sound discretion of the trial Judge to allow counsel to read opinions of the Court to the jury, as seems to be held in Dempsey *vs.* The State, 3 Tex. App. 429; Legg *vs.* Drake, 1 Ohio St. 286, it was error to allow the reading of the opinion in this particular case, for we cannot say that it may not have influenced the jury in deciding the very question which was submitted to them.

Judge Wallace's opinion concludes with the statement that "whether a libellous sense or an innocent sense is to be attributed to the publication [in this case] must be determined by the jury under proper instructions." This part of the opinion was a correct statement of the law and harmless; the trial Judge charged to the same effect. But although thus stating that the question was one which the jury must decide as a question of fact, Judge Wallace unmistakably indicated that in *his* opinion "the first impression upon reading a paragraph like this would be that the person referred to had been guilty of some breach of trust, &c." Under the Federal system of jurisprudence it is not error for the trial Judge to express *his* opinion

upon the facts, if he makes it plain to the jury that they must decide all questions of fact independent of his opinion, but neither in principle or authority is there any sanction for permitting any other person's opinion to be stated or shown to the jury upon such a question with or without, and especially without, instructions that they were not to be guided by it. Certainly we cannot say that the strong expression of Judge Wallace's opinion as to the sense in which the words of the publication were used (a question of fact) did not operate upon the jury's mind to persuade them to reach the same conclusion.

The judgment of the Circuit Court is therefore reversed and the case remanded, with instructions to award a new trial.

7012

Supreme Court of the United States.

ALEXANDER McDONALD,

Plaintiff.

against

THE PRESS PUBLISHING COMPANY,

Defendant.

Brief of Plaintiff in Opposition to Defendant's Motion for a Writ of Certiorari to the U. S. Circuit Court of Appeals for the Second Circuit.

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HAMILTON PRINT, 12 BARCLAY ST., N. Y. TEL., 3575 CORTLANDT.

In the Supreme Court of the United States.

ALEXANDER MCDONALD,

Plaintiff,

against

THE PRESS PUBLISHING COMPANY,

Defendant.

Brief of the plaintiff in opposition to the petition of the defendant for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Statement.

The plaintiff, Alexander McDonald, a citizen of Ohio, brought this action at law in the United States Circuit Court for the Southern District of New York against the defendant, The Press Publishing Company, a New York corporation, to recover damages for a libel published in the *World* newspaper, owned and published by the defendant. The action was begun in November, 1892. The *sole ground for jurisdiction of the Circuit Court was that the parties were citizens of different States.* The action was twice tried after the defendant's demurrer to the complaint, on the ground that the article was not libelous had been overruled. The first trial resulted in a verdict for plaintiff for $5,000. Upon appeal to the Circuit Court of Appeals a new trial was

ordered because of error in the trial of the case. A second trial was thereupon had, which resulted in a verdict for plaintiff for $7,000. Upon appeal from the judgment entered upon this verdict the judgment was affirmed by the Circuit Court of Appeals.

The defendant now seeks to have this Court issue a writ of certiorari to review the decision of the Circuit Court of Appeals because of alleged errors committed by that Court. The defendant has obtained a stay of execution on the judgment against it pending this application.

POINTS.

I.

The jurisdiction of the Court below depended entirely upon the opposite parties to the suit being citizens of different States and therefore this Court will not exercise the discretion given it by Section 6 of the Act of March 3d, 1891, establishing Circuit Courts of Appeals unless in cases of peculiar gravity and general importance, or in order to secure uniformity of decisions.

The jurisdiction of the Court below depended solely upon the parties being residents of different States.

By the Act of March 3d, 1891, it is provided that "the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States."

"And excepting also that in any such case as is hereinbefore made

final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

This Court has uniformly interpreted this exception to apply only "in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

Re Law Ow. Bew., 141 U. S., 583.
Same case, 144 U. S., 47.
Re Wood, 143 U. S., 202.
American Construction Co. *v.* Jacksonville Ry., 148 U. S., 372.

In the last cited case Mr. Justice Grey says: "While there have been many applications to this Court for writs of certiorari to the Circuit Court of Appeals under this provision (§ 6), two only have been granted, * * * * and in each of these cases the Circuit Court of Appeals had declined to certify the question to this Court."

In order, therefore, for this Court to grant the writ sought, it must appear that the case is one of peculiar gravity and general importance, or else that it is a case where a review of the decision of the Circuit Court of Appeals is necessary to secure uniformity of decision.

But this is not a case of peculiar gravity or general importance. It is an action for libel, and concerns only the plaintiff and defendant. There is nothing to distinguish this case from a hundred others heard by the same Court.

No question of public interest or importance is involved; the only issue was whether the plaintiff had been libelled. If so, what damage he should recover. The Court and Jury have settled those questions, and without affecting public interests in any way.

The only other ground upon which the defendant's petition may be considered is by showing that a review of the